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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

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11 DANNIE RAY HILLHOUSE, No. CIV S-03-0142-MCE-CMK
12 Petitioner, DEATH PENALTY CASE
13 vs. ORDER
14 ROBERT K. WONG, JR.,¹
15 Respondent.

16 _____ /
17 Petitioner, a state prisoner proceeding with appointed counsel, seeks a writ of
18 habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States
19 Magistrate Judge pursuant to Eastern District of California local rules.

20 On April 18, 2007, the Magistrate Judge filed amended findings and
21 recommendations (Doc. 103) herein which were served on the parties and which contained notice
22 that the parties may file objections within a specified time. Timely objections to the findings and
23 recommendations, and responses thereto, have been filed (Docs. 104, 108, 112, and 123; 107,
24 _____

25 ¹ Pursuant to Federal Rule of Civil Procedure 25(d), Robert K. Wong is substituted
26 for his predecessor. The Clerk of the Court is directed to update the docket to reflect the above
caption.

1 124, 128, 129 ,131, 133, and 136).

2 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-
3 304, this court has conducted a de novo review of this case. Having carefully reviewed the entire
4 file, the court finds the findings and recommendations to be supported by the record and by
5 proper analysis.

6 Petitioner generally objects to the findings and recommendations on the grounds
7 that the Magistrate Judge erred in his determination that the claims addressed do not relate back
8 to the original petition. The court finds those objections have no merit. Petitioner also objects to
9 the Magistrate Judge's determination that Petitioner is not entitled to equitable tolling. In
10 addition to the grounds he raised in his opposition to the motion to dismiss, Petitioner raises two
11 additional grounds for entitlement to equitable tolling: (1) that he was required to comply with
12 the state habeas pleading requirements and, (2) that Respondent waived the statute of limitations
13 or misled Petitioner regarding the state's position on the timeliness issue by agreeing to
14 extensions of time and not opposing the requests to hold the case in abeyance while he exhausted
15 his claims in state court.

16 Neither of these new grounds are sufficient for finding equitable tolling applies.
17 As the Magistrate Judge addressed in the findings and recommendations, in order to prevail on
18 the issue of equitable tolling, a prisoner must demonstrate (1) extraordinary circumstances
19 beyond the prisoner's control that (2) made it impossible to file a petition on time. Miranda v.
20 Castro, 292 F.3d 1063, 1066 (9th Cir. 2002). Petitioner fails to show how complying with the
21 state pleading requirements is such an extraordinary circumstance that it was impossible for him
22 to file a timely petition. In addition, the court finds no merit to his argument that Respondent
23 waived the statute of limitations or misled Petitioner on his position. As Petitioner concedes,
24 there was no affirmative waiver by Respondent, and simply agreeing to extensions of time and
25 not opposing a request to hold the case in abeyance is insufficient to find Respondent

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constructively waived that affirmative defense.²

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed April 18, 2007, are adopted in full:

2. Respondent's motion to dismiss (Doc. 56) is granted in part and denied in part:

3. The following claims are found to relate back to the original petition and, therefore, are considered timely:

Claim A

Claim B

Claim Q: only to the initial search of the dwelling where petitioner and Lonnie lived and to Lonnie's statements

Claim Z

Claim DD: only to the insufficiency of evidence instruction

Claim HH

Claim JJ

Claim MW

Claim PP

Claim QQ: only to the claim that the prosecutor misled the jury when she stated that she always thought that petitioner was the murderer

Claim TT

Claim XX

Claim CCE

Claim HH

Claim JJJ

Claim LLL

² Another objection Petitioner raises is in relation to his Claim NNN. Petitioner objects to a misstatement by the Magistrate Judge that the claim addresses the California Supreme Court's habeas review process, rather than automatic appeal. As the Respondent states, this was simply a misstatement by the Magistrate Judge as is evidenced by his reference to the automatic appeal process in the heading for this discussion. This simple misstatement does not affect the determination that Claim NNN does not relate back to the original petition.

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2 Claim EEEE: only with respect to the following sub-claims:

- 3 (1) death eligibility and special circumstances (Doc. 13
4 at 584);
5 (2) multiple counts of special circumstances and
6 aggravated claims (586);
7 (3) circumstances of the crime factor claims (588);
8 (4) unadjudicated violent criminal activity claims (589);
9 (5) factor 190.3(c) prior felony claims (590);
10 (6) failure to identify aggravating and mitigating factors
11 (593);
12 (7) failure to require unanimity as to aggravating
circumstances (597);
13 (8) lack of unanimous findings by the jury claims (597);
14 (9) burden of proof and persuasion claims (599);
15 (10) proportionality of sentence and comparative
sentencing claims (602)
16 (11) cumulative lack of procedural and substantive
protections violates the constitution (604); and
17 (12) cumulative error instruction only with respect to the
fair trial and Sixth and Fourteenth Amendment
claims.

18 3. The following claims are found not to relate back to the original claim and,

19 therefore, are denied as untimely:

20 Claim E
21 Claim F
22 Claim G
23 Claim R
24 Claim S
25 Claim W
26 Claim X
Claim Y
Claim II
Claim NN
Claim OO
Claim RR
Claim WW
Claim YY
Claim BBB
Claim DDD
Claim EEE
Claim FFF
Claim GGG
Claim III
Claim MMM
Claim NNN
Claim OOO

1 Claim PPP
2 Claim QQQ
3 Claim RRR
4 Claim AAAA
5 Claim BBBB
6 Claim CCCC
7 Claim FFFF
8 Claim JJJJ

9
10 Dated: November 18, 2009

11 
12 MORRISON C. ENGLAND, JR.
13 UNITED STATES DISTRICT JUDGE